

No. 04-4249

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

DEC 08 2004

LEONARD GREEN, Clerk

In re: EDWARD SMITH,

Petitioner.

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) ORDER
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1:01-cv-814

Before: SILER and CLAY, Circuit Judges; BERTELSMAN, District Judge.*

The petitioner is an Ohio inmate who filed a *pro se* habeas corpus action in the district court. Relief was denied in a judgment entered on September 2, 2004. The petitioner filed a total of four motions for reconsideration, all of which were denied. As a result of these motions, however, the district court entered new judgment forms on September 24 and September 29, 2004.

On October 13, 2004, the petitioner filed in this court the present petition for a writ of mandamus. Although he does not state the specific remedy he seeks, the petitioner clearly believes the district court erred in denying him a writ of habeas corpus.

A party filing a mandamus petition must show that he lacks adequate alternative means to obtain the relief sought. *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989). A mandamus petition cannot be used as substitute for an appeal, *City of Cleveland v. Krupansky*, 619 F.2d 572, 575 (6th Cir.) (per curiam), *cert. denied*, 449 U.S. 834 (1980), particularly when review

*The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

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is available by means of a pending, contemporaneous direct appeal. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 8 n.6 (1983).

In this case, the petitioner, after filing the present mandamus petition, also filed a notice of appeal in the district court. That appeal has now been docketed with this court as Case No. 04-4395. Because review of the proceedings in the district court are available to him by means of a direct appeal, mandamus review is not warranted.¹

It therefore is **ORDERED** that the petition for a writ of mandamus is dismissed.

ENTERED BY ORDER OF THE COURT


Clerk

¹We express no opinion as to the timeliness of the notice of appeal filed by the petitioner. It is the availability of an appeal, however, and not just the appeal itself, that precludes mandamus review.